A

Hock Peng Realty Sdn Bhd v Ting Sie Chung @ Ting Sieh Chung and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-02(W)-1129–06 OF 2016 AND Q-02(W)-343–02 OF 2017
DAVID WONG, HAMID SULTAN AND UMI KALTHUM JJCA
27 JULY 2017

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Tort — Defamation — Absolute privilege — Appellant sued respondent for defaming it by lodging prohibitory orders ('PO') against its lands for non-payment of damages assessed by court — Whether lodgment of PO and its registration with land office were connected with court proceedings and were protected by absolute privilege — Whether execution proceedings taken by respondent breached consent order between parties that payment of damages would be stayed until appeal process exhausted — Whether execution action gave appellant sustainable common law cause of action for tort of abuse of process of court

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The High Court had ordered a caveat entered by Hock Peng Realty Sdn Bhd ('Hock Peng'), a property development company, on a piece of land belonging to Ting Sie Chung @ Ting Sieh Chung ('Ting') to be removed and for damages in connection with the entry of the caveat to be assessed. The parties agreed in a consent order to stay the payment of the assessed damages until the appeal process was exhausted. In breach of that order, Ting, as soon as the damages were assessed at RM1.8m, applied to court for the issuance of a writ of seizure and sale and an ex parte prohibitory order ('PO') against seven parcels of Hock Peng's land. It was alleged that the validity of the PO was extended three times ex parte without there being any application for directions for sale and without serving any cause papers on Hock Peng. Hock Peng sued Ting for defamation and for RM20m in damages for the tort of abuse of the court's process alleging that Ting maliciously used the PO to 'extort' payment which was not yet due by virtue of the consent order; that Hock Peng's reputation was tarnished by the existence of the PO and that the filing of the execution proceedings in breach of the consent order was an abuse of the court's process. The trial court dismissed the defamation claim holding that the mere fact that the PO was registered with the land office in order to give it legal effect was not 'publication' within the meaning of that word under the law of defamation; that in any event, the PO and its registration were acts done in connection with/related to court proceedings and were therefore protected by absolute privilege. As for the tort of abuse of process of court, the trial judge awarded Hock Peng RM50,000 based on a previous award it had made for a similar cause of action and also because the writ of seizure and sale and the prohibitory order were never served on Hock Peng. Hock Peng's instant appeal was against the dismissal of the defamation claim, the inadequacy of the damages granted and the order that

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each party was to bear its own costs despite the fact that it had succeeded on one of its claims. The appeal by Ting was against the trial court's allowing of the claim for the tort of abuse of process. The trial court said costs were not awarded against Ting because Hock Peng only succeeded on one cause of action and failed on the claim for defamation and also failed to prove the allegations of 'extortion'.

Held, dismissing both appeals with no order as to costs:

(1) It was well established that any publication within the norms of court proceedings would attract the concept of absolute privilege. The cause of action for defamation on the facts of the instant case failed in limine as it was related to proceedings as per rules of court. The trial court relied on the well-established principles in the case of *Lincoln v Daniels* [1961] 3 All ER 740 to hold that absolute privilege applied. This court agreed with the trial judge's reasoning in that regard (see paras 10(a)(ii), 12(a) & (e)).

(2) On the facts, the trial judge took the view that Hock Peng's common law action of tort of abuse of process of court was sustainable on the primary fact that Ting in breach of the consent order had initiated proceedings through court process. This court agreed with the grounds of judgment of the trial judge on that issue as well as on the issue of no award as to costs (see paras 11, 12(f) & 13).

[Bahasa Malaysia summary

Mahkamah Tinggi telah memerintahkan kaveat yang dimasuki oleh Hock Peng Realty Sdn Bhd ('Hock Peng'), syarikat pembangunan hartanah, ke atas sebidang tanah yang dimiliki oleh Ting Sie Chung @ Ting Sieh Chung ('Ting') untuk dipotong dan bagi ganti rugi berhubungan dengan kemasukan kaveat untuk ditaksir. Pihak-pihak bersetuju di dalam perintah izin untuk menangguh bayaran terhadap ganti rugi yang ditaksir sehinga proses telah digunakan. Dalam melanggar perintah tersebut, Ting, sebaik sahaja ganti rugi ditaksir pada RM1.8 juta, memohon kepada mahkamah bagi pengeluaran writ perampasan dan jualan dan perintah langaran ex parte ('PO') terhadap tujuh petak tanah Hock Peng. Ia didakwa bahawa kesahan PO tersebut dilanjutkan tiga kali ex parte tanpa terdapat apa-apa permohonan untuk arahan bagi jualan tanpa menyerahkan apa-apa kertas kausa ke atas Hock Peng. Hock Peng menyaman Ting bagi fitnah dan sebanyak RM20 juta dalam ganti rugi untuk tort penyalahgunaan proses mahkamah dengan mendakwa bahawa Ting dengan niat jahat menggunakan PO untuk bayaran 'extort' yang belum tiba masa untuk dibayar disebabkan perintah izin; bahawa reputasi Hock Peng dicemar oleh kewujudan PO dan bahawa pemfailan prosiding pelaksanaan melanggar perintah izin adalah penyalahgunaan proses mahkamah. Mahkamah perbicaraan menolak tuntutan fitnah dengan memutuskan bahawa fakta semata-mata PO didaftarkan dengan pejabat tanah untuk memberikannya kesan undang-undang bukan 'publication' dalam maksud

perkataan di bawah undang-undang fitnah; bahawa walau bagaimanapun, PO dan pendaftarannya adalah tindakan yang dibuat berhubung atau berkait kepada prosiding mahkamah dan oleh itu dilindungi oleh keistimewaan mutlak. Berkenaan tort penyalahgunaan mahkamah, hakim perbicaraan mengawardkan Hock Peng RM50,000 berdasarkan ke atas award terdahulu ia telah berikan bagi kausa tindakan yang sama dan juga kerana writ perampasan dan jualan dan perintah larangaan tidak pernah diserahkan ke kepada Hock Peng. Rayuan oleh Hock Peng ini adalah terhadap penolakan tuntutan fitnah, kekurangan ganti rugi yang diberikan dan perintah bahawa setiap pihak adalah menanggung kosnya sendiri meskipun fakta bahawa ia berjaya atas salah satu tuntutannya. Rayuan oleh Ting adalah terhadap mahkamah perbicaraan yang membenarkan tuntutan bagi tort penyalahgunaan proses. Mahkamah perbicaraan menyatakan kos tidak diawardkan terhadap Ting kerana Hock Peng hanya berjaya atas satu kausa tindakan dan gagal atas tuntutan bagi fitnah dan juga gagal untuk membuktikan dakwaan-dakwaan 'extortion'.

Diputuskan, menolak kedua-dua rayuan tanpa perintah terhadap kos:

(1) Ia adalah dibuktikan bahawa apa-apa penerbitan dalam kebiasaan prosiding mahkamah akan menarik konsep keistimewaan mutlak. Kausa tindakan untuk fitnah atas fakta kes ini gagal in limine kerana ia berkaitan kepada prosiding mengikut kaedah mahkamah. Mahkamah perbicaraan bergantung ke atas prinsip-prinsip yang mantap dalam kes *Lincoln v Daniels* [1961] 3 All ER 740 untuk memutuskan bahawa keistimewaan mutklak tersebut diguna pakai. Mahkamah ini bersetuju dengan alasan hakim perbicaraan dalam hal tersebut (lihat perenggan 10(a)(ii), 12(a) & (e)).

(2) Atas fakta, hakim perbicaraan berpendapat bahawa tindakan common law Hock Peng terhadap tort penyalahgunaan proses mahkamah adalah boleh dipertahankan atas fakta utama bahawa Ting dalam melanggar perintah izin telah memulakan prosiding melalui proses mahkamah. Mahkamah ini bersetuju dengan alasan penghakiman hakim perbicaraan atas isu tersebut dan juga atas isu tidak terdapat award terhadap kos (lihat perenggan 11, 12(f) & 13).]

Notes

For cases on absolute privilege, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 394–400.

Cases referred to

Beresford v White (1914) 30 TLR 591, CA (refd)
Castro v Murray (1875) LR 10 Exch 213 (refd)
Hock Peng Realty Sdn Bhd v Ting Sie Chung [2016] MLJU 1860; [2016] 8 CLJ 393, HC (refd)
Lincoln v Daniels [1961] 3 All ER 740, CA (refd)

Royal Aquarium and Summer and Winter Garden Society v Parkinson [1891–94] All ER Rep 429; [1892] 1 QB 431, CA (refd)
Watson v Jones or M'ewan [1905] AC 480, HL (refd)
Westcott v Westcott [2008] EWCA Civ 818, CA (refd)
Yeo Ing King v Melawangi Sdn Bhd [2016] 5 MLJ 631, CA (refd)

Legislation referred to

Rules of Court 2012 O 18 r 19
Defamation Act 1957

Appeal from: Civil Suit No 22–53 of 2009 (High Court, Kuching)

Lim Heng Choo (George Lim and Alvin Wong with him) (Lim & Lim Advocates) in Civil Appeal No Q-02(W)-1129–06 of 2016 for the appellant.
Chong Siew Chiang (George Lo and Carole Ngu with him) (Chong Brothers Advocates) in Civil Appeal No Q-02(W)-343–02 of 2017 for the appellant.
Lim Heng Choo (George Lim and Alvin Wong with him) (Lim & Lim Advocates) in Civil Appeal No Q-02(W)-343–02 of 2017 for the respondent.
Chong Siew Chiang (George Lo and Carole Ngu with him) (George Lo & Partners) in Civil Appeal No Q-02(W)-1129–06 of 2016 for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] There were two appeals fixed for hearing before us on 18 April 2017 arising from the same decision of the High Court related to defamation and tort of abuse of process of court.

[2] Appeal No Q-02(W)-1129–06 of 2016 ('first appeal') is the appeal of the plaintiff in the High Court Suit No 22–53 of 2009 and Appeal No Q-02(W)-343–02 of 2017 ('second appeal') is the appeal by the defendant.

[3] The first appeal is related to the complaint of the plaintiff that the learned judge had dismissed the cause of action in defamation and only provided a sum of RM50,000 for the tort of abuse of process of court.

[4] The second appeal is related to the complaint that the court should not have allowed the claim for tort of abuse of process.

BRIEF FACTS

[5] The plaintiff's action has a chequered history. The learned trial judge has documented the history, the facts and law in articulate manner (see *Hock Peng Realty Sdn Bhd v Ting Sie Chung* [2016] MLJU 1860; [2016] 8 CLJ 393). For the purpose of both the appeals, we do not wish to repeat what was

said in the judgment, save to say that this judgment must be read together with our judgment to appreciate our grounds in the proper perspective.

[6] We will summarise the facts in our own words as follows:

(a) the plaintiff, a property development company, has advanced some money to the defendant in anticipation of developing the land belonging to the defendant;

(b) the deal did not go through and the defendant did not pay the sum advanced and the plaintiff took the opportunity to caveat the defendant's land;

(c) the caveat was subsequently removed and damages were asked to be assessed before the court;

(d) the plaintiff and defendant had by a consent order agreed that they will proceed with the assessment of damages but the payment of the assessment was to be stayed pending appeal process;

(e) the deputy registrar had assessed the damages and the defendant in breach of the agreed terms issued a writ of seizure and sale and subsequently obtained a prohibitory order against the plaintiff's land and that too ex parte, without having served any papers on the plaintiff, notwithstanding the appeal process has not been exhausted;

(f) the plaintiff says that in consequence of the conduct of the defendant, there is cause of action for defamation for false and malicious statements in the prohibitory order. The said prohibitory order lodged against the plaintiff reads as follows:

MALAYSIA

IN THE HIGH COURT OF SABAH AND SARAWAK
AT BINTULU

APPLICATION FOR EXECUTION NO. 36-01-2007 (BTU)

[ORIGINATING SUMMONS NO. 24-47-2000 (BTU)]

BETWEEN

TING SIEH CHUNG
508, Taman Li Hua,
Bintulu, Sarawak. ... Plaintiff/Judgment Creditor

AND

HOCK PENG REALTY SDN BHD
Bangunan Toh Boon Khim &
Soon Pek Guaxi,
186A-B, Jalan Tun Haji Openg
Sibu, Sarawak. ... Defendant/Judgment Debtor

PROHIBITORY ORDER
(O. 47 R. 6)

TO: The abovenamed Defendant/Judgment Debtor
HOCK PENG REALTY SDN BHD
Bangunan Toh Boon Khim &
Soon Pek Guan,
186A-B, Jalan Tun Haji Openg,
Sibu, Sarawak

WHEREAS you the said HOCK PENG REALTY SENDIRIAN BERHAD, the above-named Defendant/Judgment Debtor has failed to satisfy an Order given on 30th day of January 2007 and dated the 29th day of February 2007 in favour of TING SIEH CHUNG, the Plaintiff/Judgment Creditor, for the sum of RM1,842.073.91 (as at 15th May 2007) together with the interest at the rate of 8% per annum from the 30.01.2007 until the full settlement and costs which shall be paid by the Defendant/Judgment Debtor to the Advocates for the Plaintiff/Judgment Creditor.

IT IS ORDERED that you the said HOCK PENG REALTY SENDIRIAN BERHAD be and you are hereby, for a period commencing from of the date of registration of this Order under the provisions expiry of six(6) months from the date of this Order, prohibited and restrained from transferring, charging or leasing the properties specified in the SCHEDULE hereunder or creating any lien or equitable charge thereof by deposit of any instrument of title.

SCHEDULE

(1) All that the said HOCK PENG REALTY SENDIRIAN BERHAD'S right title share and interest in all that parcel of land together with the building thereon and appurtenances thereof situate at Upper Lanang Road, Sibu, containing an area of 3,534 Sq. Metres, more or less, and described as LOT 3368 BLOCK 19 SEDUAN LAND DISTRICT.

(2) All that the said HOCK PENG REALTY SENDIRIAN BERHAD'S right title share and interest in all that parcel of land together with the building thereon and appurtenances thereof situate at Upper Lanang Road, Sibu, containing an area of 2,964 Sq. Metres, more or less, and described as LOT 3369 BLOCK 19 SEDUAN LAND DISTRICT.

(3) All that the said HOCK PENG REALTY SENDIRIAN BERHAD'S right title share and interest in all that parcel of land together with the building and appurtenances thereof situate at Upper Lanang Road, Sibu, containing an area of 2,999 Sq. Metres, more or less, and described as LOT 3158 BLOCK 19 SEDUAN LAND DISTRICT.

(4) All that the said HOCK PENG REALTY SENDIRIAN BERHAD's right title share and interest in all that parcel of land with the building thereon and appurtenances thereof situate at Upper Lanang Road, Sibu, containing an area of 4,855 Sq. Metres, more or less, and described as LOT 3801 BLOCK 19 SEDUAN LAND DISTRICT.

(5) All that the said HOCK PENG REALTY SENDIRIAN BERHAD'S right title share and interest in all that parcel of land together with the building thereon and appurtenances thereof situate at Jalan Wong King Huo, Sibu, containing an area of 1,4324 Hectares, more

A or less, and described as LOT 3585 BLOCK 7 SIBU TOWN DISTRICT.

(6) All that the said HOCK PENG REALTY SENDIRIAN BERHAD'S right title share and interest in all that parcel of land together with the building thereon and appurtenances thereof situate at Upper Lanang Road, Sibu, containing an area of 4,471 Hectares, more or B less, and described as LOT 976 BLOCK 10 SIBU TOWN DISTRICT.

(7) All that the said HOCK PENG REALTY SENDIRIAN BERHAD's right title share and interest in all that parcel of land together with the building thereon and appurtenances thereof situate at Jalan Deshon, Sibu, containing an area of 994.1 Sq. Metres, more or less, C and described as LOT 2923 BLOCK 4 SUNGAI MERAH TOWN DISTRICT.

(hereinafter referred to as "the said 7 pieces of Lands").

(g) the plaintiff also says the breach of consent terms leading to the writ of seizure and sale as well as the prohibitory order entitles it to a cause of D action in tort of abuse of process of court;

(h) the learned trial judge held that the publications complained of in respect of and/or related to court proceedings will not attract a successful cause of action in defamation based on the concept of absolute privilege; E and

(i) the learned judge held that the plaintiff had succeeded in the cause of action against the tort of abuse of process of court and awarded only damages in the sum of RM50,000 on the ground that the writ of seizure and sale and the prohibitory order were never served on the plaintiff and F was only discovered by the plaintiff upon search being done.

PRELIMINARIES

G **[7]** In the instant case, we note that the plaintiff's claim is essentially based on defamation and the claim in respect of abuse of process of court was incidental in nature without any specifics. However, parties in the submission did not take up the issue what are the elements needed to be proved for tort of abuse of process of court. In consequence, we will not dwell with this issue.

H **[8]** The memorandum of appeal for the first appeal reads as follows:

The Appellant, HOCK PENG REALTY SDN BHD being dissatisfied with such part of the learned High Court Judge's decision given on 20.5.2016 concerning:

I (a) The Appellant's claim for defamation is dismissed;

(b) Damages to the Appellant for abuse of process is assessed at RM50,000.00 with interest of 5% per annum from 20.05.2016 until full and final payment; and

(c) Each party to bear their own cost.

appeal against the above parts of the said High Court Judge's decision to the Court of Appeal on the following grounds.

ABSOLUTE PRIVILEGE SHOULD NOT APPLY TO EX-PARTE ORDER

(1) The learned High Court Judge erred in law and in fact in holding that the absolute privilege in legal proceedings in defamation case as decided in *Lincoln v Daniels* [1961] 3 All ER 740, and in particular, the second category would apply to an ex-parte Prohibitory Order contrary to the two House of Lord cases of *Roy v Prior* [1970] 2 All ER 729 and *Taylor v Serious Fraud Office* [1999] 2 AC 177.

(2) The learned High Court Judge failed to appreciate that the ex-parte Prohibitory Order obtained against the Appellant's 7 parcels of lands where the Respondent deliberately failed to serve on the Appellant but registered the said ex-parte Prohibitory Order and extended 3 times without valid reason on ex-parte basis and registered in the Land Registry at Sibu would amount to malice on the part of the Respondent.

(3) The learned High Court Judge had misdirected herself and made erroneous finding that the failure to serve the ex-parte Prohibitory Order and its 3 extensions which were registered against the Appellant's 7 parcels of lands were not malicious.

(4) The learned High Court Judge failed to appreciate that the ex-parte Prohibitory Order with its 3 extensions and registered against the Appellant's 7 parcels of lands without serving on the same on the Appellant and without applying for the directions for sale would clearly show the true, bad and malicious intention of the Respondent to use ex-parte Prohibitory Order to tarnish the good reputation of the Appellant. In such a situation, the learned High Court Judge ought to apply the principles enunciated in *Roy v Prior* [1970] 2 All ER 729 to disallow the Respondent to abuse the Court process and enjoy the total protection of the Court to defame and tarnish the good reputation of the appellant.

INADEQUATE DAMAGES TO THE APPELLANT FOR ABUSE OF PROCESS IS ASSESSED AT RM50,000.00 WITH INTEREST OF 5% PER ANNUM FROM 20.05.2016 UNTIL FULL AND FINAL PAYMENT

(5) The learned High Court Judge erred in law and in fact in awarding RM50,000.00 damages for abuse of the Court process by taking into improper consideration that there is overlapping with the assessment of damages of unlawful caveats to be assessed in Sibu (as the previous assessment of RM 14,766,900.00 as shown in page 5 of the Judgment was set aside by the Court of Appeal). The learned High Court Judge should not take into account any overlapping in this appeal as the Sibu Court has yet to reassess damages as the result of unlawful caveats.

(6) The learned High Court Judge had failed to appreciate that there is no damages assessed for the unlawful caveats in Sibu as the assessment in Sibu Court was set aside by the Court of Appeal. As such, there is no assessment

of damages by the Sibu Court on the unlawful caveats. The learned High Court erred and made erroneous finding by speculating about the assessment of damages and erroneously took into consideration the non-existing assessment for unlawful caveat in Sibu over the same 7 parcels of lands. Such serious misdirection of law and facts had caused a miscarriage of justice.

(7) The learned High Court Judge erred in law and in fact in holding that the ex-parte Prohibitory Order without serving on the Appellant did not amount to extortion. The learned High Court Judge failed to appreciate that the extortionate act of the Respondent was the ex-parte application for a Prohibitory Order with 3 extensions and registered in the Appellant's 7 parcels of lands by falsely claiming that the Appellant had failed to satisfy the debt at the Land Registry Sibu thereby forcing the Appellant to make payment for the amount not due and payable due to the Consent Order.

(8) The learned High Court Judge should have appreciated that the extortionate act is this appeal was not the extortionate act as defined in the criminal law. The learned High Court Judge should have appreciated that the extortionate act was the unlawful demand through the ex-parte Prohibitory Order with 3 extensions registered against the Appellant's 7 parcels of lands thereby forcing, coercing or unlawfully putting the Appellant in a very difficult position to make payment to the Respondent which was not due and payable.

(9) The learned High Court Judge had also failed to appreciate and made erroneous findings by wrongly accepting the Respondent's evidence that the Respondent took out the Writ of Seizure and Sale and the Prohibitory Order against the Appellant's 7 parcels of lands was merely to secure payment and with no intention to sell the Appellant's 7 parcels of lands to satisfy the debt which was not due and payable.

The learned High Court Judge should appreciate that the Writ of Seizure and Sale and Prohibitory Order was an execution proceeding to seize the Appellant's 7 parcels of lands for sale by public auction to satisfy the debt which was not due and payable and not for security of payment. The learned High Court Judge should have concluded such extortionate action by the Respondent would clearly show malice in this case to enhance the quantum of damages to be awarded to the Appellant.

(10) The learned High Court Judge had misdirected herself in taking all the improper considerations or factors to diminish the award of damages to RM50,000.00 to the Appellant for the seizure of the Appellant's 7 parcels of lands which were in the various stages of development. The learned High Court Judge in referring to *Abdullah bin Mohammad Noor v Syarikat Pembangunan Setia Jaya* (Civil Suit No 22-98-2011) case where the learned High Court Judge had awarded RM350,000.00 with RM50,000.00 cost for the abuse of the Court process in obtaining the Writ of Seizure and Sale and Prohibitory Order for one parcel of land belonging to an individual (the Plaintiff) and the said land was not subject to any development. The learned High Court Judge erred in not

appreciating that the Appellant's 7 parcels of lands were under various stages of development to be entitled much higher damages than the award the learned High Court Judge gave in *Abdullah bin Mohammad Noor v Syarikat Pembangunan Setia Jaya* (Civil Suit No 22-98-2011) case. The Appellant had submitted that the general damages should be RM15,000,000.00 and aggravated damages of RM5,000,000.00.

(11) The learned High Court Judge should not have taken irrelevant and improper factors and consideration to award RM50,000.00 to the Appellant against the Respondent to deliberately and maliciously abused the Court process by seizing the Appellant's 7 parcels of lands with the ex-parte Prohibitory Order (which were extended 3 times) and registered in the titles of the Appellant's 7 parcels of lands at the Land Registry Sibu. The total period of the ex-parte Prohibitory Order was 2 years and the learned High Court Judge failed to direct her mind that the 7 parcels of lands' land titles and the records at the Land Registry Sibu would still show the Prohibitory Orders until now thereby permanently tarnish the good name of the Appellant that badly affected the Appellant's business and their dealings with trading partners, sub-contractors and financial institutions which were not rebutted by the Respondent.

(12) The learned High Court Judge failed to refer and accept the undisputed evidence of PW1 as to how the Appellant's business was badly affected in that the suppliers and sub-contractors who demanded upfront payments before supply and work could be carried out. The financial institutions also required more documents to obtain banking facilities. The learned High Court Judge therefore erred in law and in fact in awarding RM50,000.00 damages to the Appellant.

PARTIES BEAR THEIR OWN COST

(13) The learned High Court Judge erred in not awarding any cost to the Appellant by wrongly concluding that the failure of the Appellant's cause of action on defamation would disentitle the Appellant to any cost in succeeding in the Appellant's cause of action on abuse of Court process in the same action.

(14) The learned High Court Judge failed to appreciate that the Appellant was entitled to commence an action against the Respondent on two different causes of actions i.e. defamation and/or abuse of the Court process. The Appellant in succeeding to prove the case against the Respondent in the cause of action of abuse of the Court process, the learned High Court Judge ought to have awarded cost to the Appellant as cost would follow the event.

(15) The learned High Court Judge erred in law and in fact in not awarding cost to the Appellant when the Appellant succeeded in the proving on balance of probabilities that the Respondent had abused the Court process by taking out the Writ of Seizure and Sale and Prohibitory Order on an ex-parte basis to seize the Appellant's 7 parcels of lands whereby the

Appellant had suffered loss and damages and should be entitled to cost against the Respondent.

(16) The learned High Court Judge erred in law and in fact in disallowing any cost to be awarded to the Appellant without appreciating the facts that there was no misconduct or improper act on the part of the Appellant to be disentitled to cost. The learned High Court ought to have awarded cost of RM 150,000.00 as prayed for by the Appellant.

(17) Based on the evidence adduced in the High Court, the learned High Court Judge had erred in law and in fact in erroneously finding that absolute privilege in defamation applied to ex-parte Prohibitory Order, failed to take into consideration relevant and proper factors in awarding general damages and failed to appreciate that cost should follow the event thereby caused a miscarriage of justice.'

[9] The memorandum of appeal for the second appeal reads as follows:

1. The learned Judge erred in law and in fact in finding that the Prohibitory Order obtained by the Appellant constituted the tort of abuse of the Court process for the following reasons:

1.1 On 30.01.2007, the Appellant had obtained Judgment against the Respondent for the sum of RM 1,789,938.50 with interests and costs.

1.2 The Judgment was subject to an earlier consent order made on 28.03.2001 that 'payment of the amount assessed shall be stayed, till the disposal of the appeal'.

1.3 On 16.05.2007, the Appellant applied ex parte for a Prohibitory Order to restrain the Respondent from selling seven [7] parcels of land together with Writ of Seizure & Sale.

1.4 It is undisputed that the Appellant did not serve the Writ of Seizure & Sale and the Prohibitory Order on the Respondent and did not proceed with execution on the said lands to enforce payment on the Judgment.

1.5 The learned Judge accepted that the Appellant applied for the Prohibitory Order only to preserve Appellant under the Judgment in his favour.

1.6 The learned Judge accepted that the Appellant applied for the Prohibitory Order without malice.

1.7 There was no evidence that the Appellant tried to use the Prohibitory Order to coerce or extort the Respondent to do anything in order to accomplish a purpose other than that for which the Prohibitory Order was designed and as a result to cause damage.

1.8 The learned Judge ought to have found that the Respondent

had not proven that the Prohibitory Order breached the Consent Order and that the elements of the tort of abuse of Court process had not been proven as the consent order does not restrain Appellant from preserving his right under the judgment in his favour.

2. The learned Judge ought to have found that the Respondent's claim in the High Court is barred by *res judicata* as the Respondent had filed the same claim in respect of the same Prohibitory Order in Suit No 22-51-2009-III for alleged malicious prosecution/abuse of the Court process and the claim was struck out all and the appeals were unsuccessful up to the Federal Court.

3. The learned Judge ought to have held that there was no abuse of the court's process since the learned Judge found that 'the prohibitory order was obtained as a form of extortion is unsubstantiated because the said order was never served on the plaintiff. In my view, in order for extortion to arise, the threat must be brought home to the victim and the non-service of the order means that there was no such threat at all' stated in the paragraph iii(a) of the short ruling at page 1(f) of the Record of Appeal.

4. The Learned Judge ought to have held that there was no abuse of the process of court because the process was honesty for the purpose of maintaining the status quo of the subject-matter. It was used to seek a purpose which the very process designed for and not for other collateral purpose or ulterior motive.

5. The learned Judge erred in law and in fact in awarding damages of RM50,000.00 to the Respondent when the Respondent had failed to prove any special damages suffered during the trial.

PRELIMINARIES ON TORT OF ABUSE OF PROCESS OF COURT, ABUSE OF COURT PROCEEDINGS AND DEFAMATION, IN RELATION TO PUBLICATIONS ARISING FROM RULES OF COURT

[10] (a) *Defamation*:

(i) it is now well established that a limited company will only have a limited cause of action in defamation as opposed to an individual person (see *Yeo Ing King v Melawangi Sdn Bhd* [2016] 5 MLJ 631). As this issue was not raised by the defendants in the court below or here, we will not deliberate on this issue;

(ii) it is also well established that any publication within the norms of court proceedings will attract the concept of absolute privilege (see *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1891–94] All ER Rep 429; [1892] 1 QB 431). Absolute privilege are two types, one specifically conferred by statutes and the other arising in consequence of case laws originating from England (see Defamation Act 1957; *Gatley on Libel and Slander* (12th Ed) p 461). Where the statute

provides for privilege the usage of publications for the purpose stated as per the statute will always be accorded, the status of absolute privilege. However, if absolute privilege arises from the decisions of court, then one has to scrutinise the decisions of the court to ascertain on what fact and conduct of parties the concept of absolute privilege was accorded (see *Westcott v Westcott* [2008] EWCA Civ 818; Ramasamy Iyer's *The Law of Torts* (10th Ed) at pp 407–410).

(b) *Abuse of process of court*:

(i) it is now well recognised that there are two types of abuse of process of court. One is related to court proceedings itself where for example the court can order a matter to be struck out under O 18 r 19 or inherent jurisdiction or stay proceedings, etc. The applicant who succeeds in such a procedure will only be entitled to costs and not damages;

(ii) the other type is the common law action of tort of abuse of process of the court. A claimant who succeeds in the action will be entitled to costs as well as damages, etc; and

(iii) both are abuse in a generic term only but the relief and the elements required to establish will be different. It will be based on rules of court and/or laws. Abuse in both generally means everything, which is contrary to good order established by usage. Abuse of process of court refers to situation where the court's process is used for unlawful and not for the actual purpose intended to achieve justice (see *Castro v Murray* (1875) LR 10 Exch 213; *Janab's Key To Civil Procedure* (5th Ed) pp 252–255).

[11] In the instant case, it is not one related to abuse of process in a matter before the court and an action taken in the court proceedings itself to arrest the abuse. The action in this case is related to common law tort and on the facts the learned judge had taken the view that it is a sustainable cause of action based on the primary facts that the defendant in breach of consent terms has initiated proceedings through court process.

[12] We have read the appeal record and the able submissions of the parties. After giving much consideration to the submission in respect of both the appeals, we take the view that both the appeals should be dismissed. Our reasons, inter alia, are as follows:

(a) the cause of action for defamation on the facts of the instant case must fail in limine as it is related to proceedings as per rules of court. The court had relied on the well established principles in the case of *Lincoln v Daniels* [1961] 3 All ER 740 to hold that absolute privilege applies;

(b) in *Lincoln*'s case the defendant claimed absolute immunity in respect of

communications sent by him to the Bar Council relating to professional misconduct of the plaintiff who was a Queen Counsel. The court made a distinction between a Bench of Inns of Court (which was responsible for conduct of barristers then) and Bar Council (which was an association). The court held that a Bench of the Inns of Court which inquire into the conduct of a member of the Bar will be accorded absolute privilege to the proceedings. However, a complaint to the Bar Council will only have a qualified privilege. Delvin LJ opined that absolute privilege fell into three categories, namely:

(i) all matters that are done *coram judice* and it extends to everything said in the proceedings by the judges, parties, counsel, witnesses and includes documents put in evidence;

(ii) everything done from the inception of the proceedings and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and including the writ or other document which is instrumental for instituting the proceedings; and

(iii) privilege attaching to evidence which a witness gave *coram judice* extends to the precognition or proof of that evidence taken by solicitor;

(c) the third category stated above is said to be the most difficult to define (see *Watson v Jones or M'ewan* [1905] AC 480). It is immaterial whether the proof is or is not taken in the course of proceedings (see *Beresford v White* (1914) 30 TLR 591);

(d) in the instant case, the learned High Court judge took the view that the second category of absolute privilege set out in *Lincoln*'s case applies;

(e) we are in agreement with reasoning of the learned trial judge to hold that absolute privilege applies. The said part of the judgment reads as follows:

> In the joint reply submission of Hock Peng's 5 counsels, it was submitted that the prohibitory order is not a pleading and neither does it come within the meaning of 'other documents brought into existence for the purpose of the proceedings' ie the second category in *Lincoln*'s case. With respect I am unable to agree with them. Although the prohibitory order is obviously not a pleading nor an affidavit but the order would still in my view fall within the meaning of 'other documents …' stated in the category. This is because the order was made after the application for a writ of seizure and sale has been approved by the court which followed the award of damages in the originating summons and which in the context of this case is the pleading. Since the registration with the Land Office of Sibu is mandated by law for without it, ie the registration, the prohibitory order would be totally useless and will not have the legal effect for which it was intended, I am further of the view that it does not come within the meaning of publication in the law of

defamation. Thus, on these grounds the cause of action founded on defamation fails for the prohibitory order was not published and even if it were, it is completely excused by the defence of absolute privilege.

(f) on the issue of tort of abuse of process of court and damages thereof, we are inclined to agree with the grounds of judgment of the learned trial judge which read as follows:

> In *Abdullah*'s case, I had ordered RM350,000.00 as damages for abusing the court process. Based on the considerations above and using *Abdullah*'s case as a guideline (which I think that I am entitled to since the decision has gone through the rigours of the appeal process), I would award Hock Peng damages in the sum of RM50,000 — not the RM20m prayed by it. I further order interest at 5%pa with effect today until full and final settlement thereof. As for cost, since this action is premised on two causes of action but Hock Peng only succeeded in one and also failed to prove their allegation on extortion, I would not order cost against the defendant. In other words, each party is to bear their own costs.

[13] For reasons stated above, both the appeals are dismissed with no order as to costs. Deposits are to be refunded.

We hereby order so.

Reported by Ashok Kumar